BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EMILY SUAREZ DURAN,	:	
Claimant,	:	File No. 5054140
vs.	:	ARBITRATION
TYSON FOODS, INC.,	:	DECISION
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1108.50, 1402, 2501, 2602

FILED
AUG 24 2017
WORKERS COMPENSATION

STATEMENT OF THE CASE

Emily Suarez Duran, claimant, filed a petition in arbitration seeking workers' compensation benefits from Tyson Foods, Inc., self-insured employer as defendant. Hearing was held on February 8, 2017 in Sioux City, Iowa.

Claimant, Emily Suarez Duran, testified live at trial. The evidentiary record also includes Claimant's Exhibits 1-10 and Defendant's Exhibits A-H. Defendant objected to Claimant's Exhibit 6, pages 16 and 17; an addendum to the independent medical evaluation (IME) report from Dr. Bansal. Exhibit 6, pages 16 and 17 were admitted but defendant was given the opportunity to obtain post-hearing rebuttal evidence.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties submitted post-hearing briefs on April 19, 2017.

ISSUES

The parties submitted the following issues for resolution:

1. Whether the stipulated August 22, 2014 work injury was the cause of claimant's ongoing symptoms?

2. Whether claimant is entitled to alternate medical care?

3. Whether claimant has reached maximum medical improvement (MMI) and if so, the appropriate commencement date for any permanent partial disability benefits?

4. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant asserts she sustained permanent disability to her body as a whole as the result of an August 22, 2014 work injury. Defendant admits she sustained a work injury, but contends the injury was merely temporary in nature. I find claimant sustained permanent disability as a result of the work injury.

Claimant, Emily Suarez Duran, (hereinafter, "Emily') was in her mid-twenties at the time of hearing. She has lived in Denison, Iowa on and off for the last 15 years. Emily worked for Tyson Foods, Inc. (hereinafter "Tyson") at the Denison plant. On March 25, 2014, she underwent and passed a pre-employment physical and was cleared to work without any restrictions. (Exhibit 8, page 1) Emily worked at Tyson labeling boxes. Her employment with Tyson ended in 2010 for personal reasons. She returned to work for Tyson in March of 2014.

On August 22, 2014, Emily was still working labeling boxes. Although lifting boxes was not typically part of her job, she needed to on this date because a belt line broke. She was picking up a box to put on the line when she felt a sharp, pinch-like sensation in her lower back. She could not move and she could not walk. Emily estimated that the box weighed 15 to 35 pounds. According to Emily, everyone saw her reaction and the pain she was in. A supervisor took her downstairs to the nurse's office. Emily was given ice and ibuprofen. She also completed an injury report. (Ex. 8, p. 2) Emily testified that she still was not able to walk; a supervisor and her stepdad (who also worked at Tyson) carried Emily to her car. Her stepdad also carried her from her car into her home. (Testimony)

Later that evening Emily's mother insisted she go see a doctor; Emily went to the emergency department at Crawford County Hospital. She reported that she worked at Tyson and felt her back go while lifting boxes at work. She had low back pain on the right-hand side. Emily described her right side as miserable. She did not have numbness or tingling. They took x-rays and provided her with medications. The assessment was acute low back strain. (Ex. 1, pp. 1-5; Ex. C)

Emily returned to work the next day but she was still having a lot of pain and could not walk. Her pain persisted and Tyson sent her to see Todd Woollen, M.D. on August 26, 2014. She presented with right low back pain consistent with a herniated disc. She reported that on Friday she had lifted a box that weighed 20-35 pounds; when she did so she felt really bad pain and could not move. The doctor prescribed

Lortab and ibuprofen. He also restricted her activities significantly. She was to follow up in 2 weeks. (Ex. 2, p. 1)

On September 9, 2014, Emily returned to Dr. Woollen. She described her pain as 7/10 when she bent over. She noted the pain did not radiate significantly down her leg. The doctor noted that Emily did not usually have radiation and that it was focused in the sacral notch. Dr. Woollen ordered an MRI. (Ex. 2, p. 2)

Emily underwent an MRI of her lumbar spine on September 11, 2014. The MRI revealed a moderately large posterior central disc protrusion at L4-5; less pronounced posterior disc protrusions at L3-4 and L4-5-S1 of doubtful significance; otherwise unremarkable MRI examination. (Ex. 1, pp. 7-9)

On September 15, 2014, Dr. Woollen saw Emily again. They discussed the MRI findings. Dr. Woollen referred Emily for surgical consult. (Ex. 2, p. 4) On that same date Dr. Woollen sent a letter to Ric E. Jensen, M.D. He noted that Emily's MRI confirmed an L4-5 herniated disc. She continued to have positive single leg raise test bilaterally. (Ex. 2, p. 3)

On October 3, 2014, Dr. Jensen wrote to Dr. Woollen after he had the opportunity to examine Emily. Dr. Jensen noted that Emily's symptoms had improved with conservative treatment. He also noted that initially she had radicular leg symptoms, but they had now tended to abate. Dr. Jensen felt that nothing within the review of systems would significantly impact her current clinical scenario. Dr. Jensen stated that Emily did not report focal symptoms of a lumbosacral radiculopathy in either lower extremity. Dr. Jensen planned to continue to monitor Emily and maintain a conservative approach. (Ex. 3, pp. 1-3)

Emily returned to see Dr. Jensen on November 5, 2014. She appeared stable with regard to her overall level of back and proximal lower extremity referred pain. She was working six-hour shifts. Dr. Jensen started a course of medication for back spasms and fatigue. He also issued her a one-time prescription for breakthrough pain. He kept her at the same level of physical activity. He informed Emily that if her symptoms could not be managed with conservative treatment she may need to consider more aggressive intervention in the form of epidural cortisone injections trials and/or operative stabilization of her lumbosacral spine. (Ex. 3, pp. 4-6)

Dr. Jensen saw Emily again in April of 2015. He noted that in the past her symptoms had tended to dominate on the left side and were thought to be secondary to disc wall annular wall disruptions and annular wall bulges at L4-5 and L5-S1 lumbosacral segments. She was reporting her overall level of pain as moderated. Her functional capacity had also improved. She had undergone outpatient physical therapy and did use medication. Her lower extremity neurological examination was normal. Dr. Jensen felt that she could maintain an 8 hour work shift. Dr. Jensen stated, "I do feel that she has reached a level of maximum medical improvement with respect to conservative management of her lumbar spinal discogenic pathology (as of March 1, 2015)." (Ex. 3, p. 7) He recommended an functional capacity evaluation (FCE) but

provided her with restrictions until the FCE could be performed. She was to avoid those activities which placed undo axial loading and torsion within her lumbosacral spine; particularly, repetitive lifting/twisting with weight greater than 30 to 40 pounds in her hands. Emily was to follow up with Dr. Jensen on an as needed basis. (Ex. 3, pp. 7-8; Ex. B, pp. 1-2)

On May 26, 2015, Emily saw Jonathan E. Fuller, M.D. at Nebraska Spine and Pain Center. Emily reported low back and left back pain, left leg pain, and left groin pain radiating to the knee. She also reported sharp, pressure-like pain and pins/needles type pain. She said her pain got worse after she stopped taking approximately 2 hydrocodone per day. After examination, the doctor's diagnosis was low back pain. The doctor felt that the left leg symptoms appeared to stem from her left hip. He recommended non-operative care, left diagnostic hip injection. He continued her current restrictions of lifting 35 pounds occasionally, 20 pounds frequently. (Ex. 4, pp. 1-5; Ex. A, pp. 9-13) According to Emily, the hip injection was not authorized or administered. (Testimony)

In late June of 2015, claimant's counsel advised defendant that Emily tried to return to work but was unable to work due to her pain. Emily requested to go back to see Dr. Jensen because she was now interested in surgery. (Ex. 9, p. 1) Emily also stated that if Dr. Fuller could see her right away she would be fine with seeing him. (Ex. 9, p. 3)

Emily returned to see Dr. Fuller on July 7, 2015. She reported increased low back pain with prolonged sitting and with bending, walking. He recommended Emily undergo bilateral L5-S1 transforaminal epidural steroid injection. (Ex. 4, pp. 7-10; Ex. A, pp. 6-8)

On July 14, 2015, Emily saw Liane E. Donovan, M.D. at Nebraska Spine and Pain Center for a bilateral L5-S1 transforaminal epidural. (Ex. 4, pp. 11-12; Ex. A, pp. 4-5)

Emily returned to see Dr. Fuller on July 30, 2015. She reported no leg pain or back pain. She was back to regular duty work. The doctor noted she was doing well after her injection. He stated she could continue regular duty work. He placed her at MMI and advised her to follow up as needed. (Ex. 4, pp. 13-14; Ex. A, pp. 2-3)

Two weeks later, the Tyson plant where Emily worked closed. Prior to leaving the plant for the last time, Emily completed paperwork about her injury. She reported that she had fully and completely recovered from her injury but she also noted that she had on and off pain. The paperwork is dated August 17, 2015. (Ex. 8, p. 8)

Also, on August 17, 2015, claimant's counsel sent correspondence to defense counsel which stated: "Emily wants to pursue surgery. She would like to go back to the neurosurgeon in Omaha. Could this be arranged?" (Ex. 9, p. 4) Treatment was again requested on August 20, 2015. Claimant also stated that if treatment was being denied then she wanted a denial letter. (Ex. 9, p. 5) On August 24, 2015, claimant's counsel

faxed a letter seeking clarification as to whether care was being denied and if so, what was the reason for the denial. (Ex. 9, p. 6)

Emily testified that while the epidurals did help her pain, the pain and symptoms returned. From the time the plant closed until the time of the arbitration hearing, she continued to request a return visit to Dr. Jensen. (Testimony; Ex. 9, pp. 4-8) In the alternative, Emily requested a denial letter so she could obtain care on her own. (Ex. 9, pp. 5-10; Ex. F, pp. 2-4)

Emily received unemployment after the plant closed. In September of 2015, Emily discovered she was pregnant. She obtained her GED in May of 2016. (Testimony)

On May 6, 2016, Emily was seen at Crawford County Hospital; she was 33 weeks pregnant and having contractions. She was given a shot which stopped her contraction. The impression included premature contractions, now resolved and back pain from herniated disc. (Ex. 1, p. 11) In June of 2016, Emily delivered her third child. She testified that her back pain did not go away after her son was born. (Testimony)

On August 26, 2016, an ambulance was sent for Emily. Upon arrival the paramedic noted that she was in terrible back pain. She was taken to the emergency room. At the hospital she reported she had been experiencing pain all day, but the pain had increased. (Ex. 1, pp. 10, 12-15)

On September 7, 2016, defense counsel sent an email to claimant's counsel advising that the defendant was denying further treatment. (Ex. F, p. 3) The defendant finally provided a letter of denial on September 9, 2016. (Ex. F, p. 1)

On November 16, 2016, Emily sought treatment with J.B. Gill, M.D., at Nebraska Spine and Pain Center. Emily reported low back pain with radiation to the bilateral lower extremities, equally, via the posterior thighs to the knees. She reported the onset of her symptoms was in 2014 while she was at work. She said that her symptoms gradually returned and were now getting worse. The doctor noted workers' compensation was no longer providing the care and she was using personal insurance. Dr. Gill reviewed the 2014 MRI and noted disc degeneration at L3-4, L4-5, and L5-S1. He also noted a central disc herniation at L4-5 and an annular tear at L5-S1. The doctor ordered a new MRI. The notes indicate that she was working at WESCO without restrictions. The doctor stated that Emily may need to undergo a discogram procedure to delineate the pain generator. (Ex. 4, pp. 15-25)

On December 19, 2016, Emily underwent an IME with Sunil Bansal, M.D. at the request of her attorney. As a result of the December IME, Dr. Bansal issued a written report on January 6, 2017. (Ex. 6, pp. 1-12) In addition to the examination, Dr. Bansal reviewed the medical records provided to him. Emily reported that she did not have any injuries or problems with her back before this work injury. At the time of the exam, Emily continued to have constant low back pain, including spasms. There was also a pinching sensation in the left side of her low back and she had frequent numbness and

tingling of both her legs during times of the more intense pain. She had numbness and tingling in both legs, into all of her toes and the soles of her feet. He noted that on the date Emily was taken via ambulance she was experiencing numbness and tingling in all of her extremities, including her hands, fingers, feet, and toes. Emily reported that the upper extremity numbness and tingling had not returned since that time. Dr. Bansal's diagnosis was L4-L5 and L5-S1 disc herniations. He agreed that she had reached MMI on July 30, 2015. Dr. Bansal opined that the acute lifting and twisting of the box from the floor was a significant contributing factor towards her L4-L5 and L5-S-1 disc herniations. He emphasized that she was not experiencing lumbar spine discomfort just prior to her work injury. Thus, both mechanistically and temporally Emily's back condition was related to the August 22, 2014, work injury. Dr. Bansal felt she met the criteria for the DRE Category II and some of Category III impairment and assigned 8 percent whole person impairment. He restricted her to no lifting over 25 pounds occasionally and no lifting over 10 pounds frequently. No frequent bending or twisting. She could sit, stand, and walk as tolerated; however, she should avoid doing any of those for more than 30 minutes at a time. (id.)

On February 7, 2017, Dr. Fuller signed a letter authored by defendant's attorney. By signing the letter he confirmed that the report from Dr. Bansal did not change any of his opinions. (Ex. A, p. 1)

On February 8, 2017, Dr. Bansal issued an addendum; he answered several questions posed by claimant's counsel. (Ex. 6, pp. 16-17) Dr. Bansal stated that the epidural injections could only relieve the inflammation caused by a disc protrusion, it could not relieve the protrusion in any way. He noted that Dr. Fuller saw Emily only two weeks after her epidural when she would have been in the window of "masked pain relief" from the epidural. (Ex. 6, p. 16) He also noted that after a period of time the epidural's effect would wear off and her pain would return. Dr. Bansal further stated that because Dr. Fuller saw the claimant during the "masked pain relief" period he was not in a position to adequately ascertain her current condition. (Ex. 6, p. 17)

Emily returned to see Dr. Fuller in March of 2017. Her chief complaint was low back pain. She described that pain as burning, shooting, sharp, and pressure-like with prolonged positions. Emily reported to Dr. Fuller that her back pain resumed in August of 2015; however, the doctor thought it seemed possible that her back pain actually resumed during her subsequent pregnancy which began in September of 2015. Emily reported that her pain was so severe during her pregnancy that her labor was induced in the 37th week of gestation. At the time of the March appointment, Emily reported that her back pain was worse with her menses, also with prolonged sitting, standing, or lying. Dr. Fuller noted a symptom-free interval after treatment back in 2015. (Ex. A, pp. 16-18)

On March 21, 2017, Dr. Fuller signed a letter authored by defendant's attorney. By signing the letter, Dr. Fuller agreed that the letter accurately set forth his opinions. Dr. Fuller reaffirmed that Emily reached MMI for her work injury as of July 30, 2015. He noted that in July of 2015 Emily was symptom free for an extended period and only had renewed back pain after she became pregnant. Dr. Fuller did not believe that surgery

was a reasonable or necessary course of treatment. He further opined that even if surgery was pursued he did not believe that it would be related to her work injury at Tyson. Dr. Fuller did not believe that Emily's symptoms were related to the work incident at Tyson. (Ex. A, pp. 14-15)

In the present case there are two opinions regarding causation; the opinions of Dr. Fuller and Dr. Bansal. I do not find the opinions of Dr. Fuller to be persuasive. It is not clear if Dr. Fuller was provided all the treatment records from outside of his office so it is not known what information he had at the time he rendered his most recent opinions. Furthermore, in the March 9, 2017 clinical note Dr. Fuller states, "Her back pain apparently resumed, she states, in August 2015 although it seems possible that her back pain actually resumed during her subsequent pregnancy, which began in September 2015." (Ex. A, p. 17) He also noted that in July of 2015 Emily was symptom free for an extended period and only had renewed back pain after she became pregnant. (Ex. A, pp. 14-15) He then opined that her back pain was not from her original workplace injury but rather from a personal health problem. (Ex. A, p. 18) Dr. Fuller's opinions do not account for the fact that claimant had been experiencing back pain prior to her pregnancy and even requesting additional treatment, including surgery, in June and August of 2015. (Ex. 9, p. 4) Therefore, Dr. Fuller's opinions are based on his assumption that her back pain resumed after she became pregnant; this assumption is simply wrong. Thus, Dr. Fuller's opinions are based on an incomplete and/or inaccurate history and cannot be relied upon. Therefore, I give greater weight to the opinions of Dr. Bansal. Dr. Bansal has opined that both mechanistically and temporally Emily's current back condition is related to the August 22, 2014, work injury. I find that claimant has carried her burden of proof to show that her ongoing symptoms are related to the work injury.

At hearing, claimant testified regarding the symptoms she still experienced and attributed to the work injury. Emily testified that initially after the injury she had pain in her low back that was similar to a pinch. She described the pain as in the middle of her back, at the top of the belt line and the fronts of her legs were numb. At the time of hearing she had pain in the middle of her belt line, down her right leg to her knee. The symptoms affect her ability to walk at times. She cannot step on her heel or she will limp; so she walks more on her tip toes. She said that she does still have tingling in her hands; this occurs when her pain is very strong. She was taking ibuprofen to help with the pain. She said the injury has affected her ability to perform her activities of daily living because she cannot perform the activities for very long. Her pain increases when she walks too long, stands in one spot, sits too long, or lies in bed for too long. Her symptoms have continued to get worse. (Testimony)

Claimant is requesting alternate medical care with an appropriate specialist. Defendant has not provided claimant with any care since the formal denial of ongoing care on September 9, 2016. (Ex. F, p. 1) Emily has carried her burden of proof to demonstrate that her ongoing symptoms are related to her work injury. Therefore, defendant is obligated to provide reasonable and necessary treatment.

Although Dr. Jensen stated Emily was at maximum medical improvement, he stated this was with respect to conservative management of her lumbar spinal discogenic pathology. Emily testified that at that time she was hesitant to undergo surgery. Since that time, Emily has also seen Dr. Gill who has stated Emily may need to undergo a discogram procedure to delineate the pain generator. (Ex. 4, pp. 15-25) Dr. Bansal has stated that Emily would benefit from injections, or other treatment as recommended by a pain specialist. He also noted that if her radicular pain worsened he would recommend another surgical consult. (Ex. 6, p. 11) Emily testified she is now interested in a more long-term solution. This is why she sought treatment with Dr. Gill at the Nebraska Spine and Pain Center. Dr. Gill recommended a repeat MRI and discogram. She would like to pursue these recommendations. Emily also testified that she was terrified at the idea of having surgery. She did not want to have surgery until she tried other options first. However, her symptoms have persisted and worsened despite conservative treatment. Unfortunately, defendant has not offered any additional treatment. Emily is now willing to consider surgery. Claimant is seeking an order compelling defendant to provide alternate medical care, either pain management or authority to return to see Dr. Gill or another specialist to seek a more definitive solution.

Defendant argues against granting claimant alternate care. Specifically, defendant argues that Dr. Fuller just recently re-examined the claimant and feels surgery is not a reasonable path and felt her condition was not related to the work injury. Defendant is not offering claimant any treatment because defendant contends that the ongoing symptoms are not related to the work injury. However, the undersigned has found that the preponderance of the evidence does support claimant's contention that her ongoing symptoms are related to the work injury. Thus, I find that defendant is responsible to provide prompt, reasonable, and necessary treatment. Defendant shall authorize an appropriately qualified surgeon and/or pain specialist to consider further treatment options for Emily.

Until Emily is able to undergo the additional testing and treatment it is premature to determine if she is or is not at MMI. Thus, the issue of permanency is not ripe at this time.

Finally, claimant is seeking costs. Specifically, the costs associated with the February 8, 2017 addendum from Dr. Bansal. (Ex. 6, p. 18) Costs are to be assessed at the discretion of the deputy hearing the case. Claimant was generally successful in her claim. I exercise my discretion and award the expense in the amount of $195.00 of the Dr. Bansal addendum as a cost under 876 IAC 4.33(6).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is

proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Based on the above findings of fact, I conclude that claimant had shown by a preponderance of the evidence that her ongoing symptoms are related to the work injury of August 22, 2014.

Because claimant's ongoing symptoms are causally connected to the work injury, the defendant is responsible for proving medical treatment. Under Iowa law, the employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Thus, I find that defendant is responsible to provide prompt, reasonable, and necessary treatment. Defendant shall authorize an appropriately qualified surgeon and/or pain specialist to consider further treatment options for Emily.

Until Emily is able to undergo the additional testing and treatment, it is premature to determine if she is or is not at MMI. The issue of permanency is not ripe at this time.

All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner. As noted above, I exercise my discretion and assess defendant costs in the amount of one hundred ninety-five and no/100 dollars ($195.00).

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall identify and authorize treatment with an appropriately qualified surgeon and/or pain specialist to consider further treatment options for Emily.

Defendant shall reimburse claimant's costs in the amount of one hundred ninety-five and no/100 dollars ($195.00).

Defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 24th day of August, 2017.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.